

1936634 (Migration) [2020] AATA 3766 (9 June 2020)

DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 1936634

MEMBER: Justin Owen

DATE: 9 June 2020

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision to cancel the applicant's Subclass 010 (Bridging A) visa.

Statement made on 09 June 2020 at 5:15pm

CATCHWORDS

MIGRATION – cancellation – Bridging A (Class WA) visa – Subclass 010 (Bridging A) – multiple criminal convictions – bridging visa granted after application for partner visa – genuine and continuing relationship – hardship for Australian citizen spouse – possibility of applying for Bridging E visa – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 48, 116, 189, 198, 359A
Migration Regulations 1994 (Cth), r 2.43

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision dated 19 December 2019 made by a delegate of the Minister for Home Affairs to cancel the applicant's Subclass 010 (Bridging A) visa under s.116 of the *Migration Act 1958* (the Act).
2. The delegate cancelled the visa under s.116(1)(g) Reg. 2.43(1)(oa) on the basis that the applicant had been convicted of an offence against a law of the Commonwealth, State or Territory (whether or not the applicant held the visa at the time of the conviction and regardless of the penalty imposed (if any)). The issue in the present case is whether that ground for cancellation is made out, and if so, whether the visa should be cancelled. The applicant was convicted [in] January 2019 at [Court 1] of two counts of enter prescribed premises of any person without lawful excuse and one count of commit act of indecency with person 16 years or over. In addition to these convictions, the applicant has previously incurred a conviction [in] April 2018 at [Court 2] for common assault (domestic violence); as well as convictions [in] September 2017 at [Court 3] for one count of affray; and two counts of assault occasioning actual bodily harm.
3. The Tribunal exercised its discretion to hold the hearing by telephone. The hearing was held during the COVID-19 pandemic. The Tribunal determined it was reasonable to hold a hearing by telephone, having regard to the nature of this matter and the individual circumstances of the applicant. The Tribunal also had regard to the Tribunal's objective of providing a mechanism of review that is fair, just, economical and quick, and the delay to the matter if the hearing was not to be conducted by telephone. The Tribunal is satisfied that the applicant was given a fair opportunity to give evidence and present arguments.
4. The applicant appeared before the Tribunal via teleconference on 6 May 2020 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant's wife [Ms A].
5. The applicant provided the Tribunal with a range of submissions, most of which were submitted previously to the delegate that cancelled his visa on 19 December 2019. The Tribunal has taken these as well as documents the applicant previously provided to the delegate into account. These documents include:
 6. - Statement by the applicant 20 November 2019
 7. - Joint letter by both the applicant and his wife [Ms A] dated 20 December 2019
 8. - Letter by the applicant 20 November 2019
 9. - Statement by the applicant's wife [Ms A] 20 November 2019
 10. - Correspondence of [Ms A] to the NSW Police Local Area Commander (undated)
 11. - Character references from Ms [B]; Mr [C]; and [Ms A]
 12. - Invoice issued by the applicant for payment 12 September 2019
 13. - Screenshot of statements from the applicant's ANZ Bank account
 14. - Copy of residential tenancy agreement in names of the applicant and [Ms A]

15. - Copy of the applicant's discharge referral for [Ms A] 19 September 2019
16. - Copy of the applicant's Release certificate from [Gaol 1].
17. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

18. Under s.116 of the Act, the Minister may cancel a visa if he or she is satisfied that certain grounds specified in that provision are made out. Relevantly, to this case, these include the ground set out in s.116 (1)(g). If satisfied that the ground for cancellation is made out, the decision maker must proceed to consider whether the visa should be cancelled, having regard to all the relevant circumstances, which may include matters of government policy.

Does the ground for cancellation exist?

19. A visa may be cancelled under s.116(1)(g) if the Minister is satisfied a prescribed ground for cancelling the visa applies to the applicant. The prescribed grounds for cancellation are set out in r.2.43 of the Migration Regulations 1994 (the Regulations). In the present case, the ground in r.2.43 (oa) is relevant.
20. At the hearing the applicant acknowledged to the Tribunal that he had incurred the convictions summarised in paragraph 2. The applicant confirmed to the Tribunal that he had incurred the convictions. In oral evidence to the Tribunal the applicant confirmed that he had been charged with criminal offences by the NSW Police and convicted. The applicant acknowledged there are prescribed grounds to cancel his visa.
21. For these reasons, the Tribunal is satisfied that the ground for cancellation in s.116(g) exists. As that ground does not require mandatory cancellation under s.116(3), the Tribunal must proceed to consider whether the visa should be cancelled.

Consideration of discretion

22. There are no matters specified in the Act or Regulations that must be considered in the exercise of this discretion. The Tribunal has had regard to the circumstances of this case, including matters raised by the applicant, and matters in the Department's Procedures Advice Manual (PAM3) 'General visa cancellation powers'.

23. *The purpose of the visa holder's travel and stay in Australia, whether the visa holder has a compelling need to travel to or remain in Australia*

24. The evidence before the Tribunal indicates that the applicant arrived in Australia on 24 December 2016 on a Visitor visa. The evidence suggests he arrived in Australia with the intention of visiting his partner and subsequent sponsor of his Partner visa application. [In] December 2017 the applicant and his partner [Ms A] married. The applicant then made an application for a Partner (subclass 820/801) visa on 21 December 2017 based upon his marriage to [Ms A].
25. Based on the Partner visa application, the applicant was granted a Bridging A (subclass 010) visa whilst the Department considered his Partner visa application. The applicant held this visa until 19 December 2019 when it was cancelled by the delegate on the ground outlined in this decision record.

26. The Tribunal notes that the applicant remains in a relationship with [Ms A] today. Both parties claim to have cohabitated for about three years which the Tribunal accepts. They claim to share their living costs and expenses. The applicant's wife [Ms A] continues to sponsor the applicant. The Tribunal is satisfied that the applicant and sponsor are in a genuine and continuing relationship at the time of decision.
27. Both parties have declared that the applicant's intention is to remain permanently in Australia both in written statements and in their oral testimony to the Tribunal. The Tribunal notes the applicant's evidence that his sibling also resides in Australia. The Tribunal accepts that the purpose of the applicant's travel to and stay in Australia was on the basis of his relationship with his sponsor [Ms A] and his intention was to remain in a permanent and ongoing relationship with her. In response to the Tribunal's questions he stated that he wanted to start a family in Australia. The Tribunal accepts the applicant's evidence in this regard.
28. On the evidence before it concerning the purpose of the visa holder's travel and stay in Australia and whether the visa holder has a compelling need to travel to or remain in Australia, the Tribunal weighs this factor against cancelling the visa.

29. *The extent of compliance with visa conditions*

30. The evidence indicates that the applicant's Bridging visa was cancelled by the delegate due to the prescribed grounds of the applicant's criminal convictions and the delegate being satisfied that the grounds for cancelling the visa outweighed the reasons not to cancel the visa. The Tribunal notes that there are no conditions attached to the applicant's Bridging visa. The Tribunal weighs this factor neither in favour nor against cancelling the visa.

31. *The degree of hardship that may be caused (financial, psychological, emotional or other hardship)*

32. The Tribunal has considered the degree of hardship that may be caused to the applicant and his family members should his Bridging visa be cancelled.
33. The applicant has claimed that he will suffer from hardship and will suffer future hardship if the visa cancellation is not set aside. The Tribunal is satisfied that the cancellation of the applicant's Bridging Visa A will impose some hardship upon the applicant.
34. The applicant stated that should his visa be cancelled he will no longer be able to work and send money back to his son in Fiji. The applicant informed the Tribunal that he has a [age]-year old son from a previous relationship who lives with the parents of his former partner. The Tribunal notes from the evidence the applicant provided that he has been engaged in gainful employment in Fiji previously. He claims to have worked for his family in [Industry 1]. He stated he has completed a Diploma in [field] through Fijian National University. He also has experience in farming. The Tribunal accepts that the hourly rate of pay in Fiji may be less than that of Australia, but it does not consider that is evidence that the applicant will be unable to either acquire employment in Fiji or continue providing financial support to his son. The applicant stated that if he returned to Fiji he would prefer to stay in his village and work on the farm. That is a matter of choice for the applicant. There is no corroborative independent evidence before the Tribunal over both the quantum of any financial support and over what time the applicant has been providing his son with financial support. Nevertheless, the Tribunal accepts the applicant has been providing financial support to his son on a regular basis since his arrival in Australia. The Tribunal does not however accept that he will be unable to continue doing so should he be compelled to return to Fiji.

35. The applicant and [Ms A] each discussed the financial hardship that would be caused to themselves should the applicant's visa be cancelled. As discussed in the previous paragraph, the Tribunal is not satisfied on the evidence before it that the applicant is unable to seek gainful employment should he return to Fiji. There is no evidence before the Tribunal or claim made that he would be unable to seek gainful employment in Fiji. It is also open to his wife [Ms A], who is in employment, to provide him with a degree of financial support from offshore if they both thought it necessary. The Tribunal acknowledges that the loss of a 'dual income' in the one household will cause a degree of financial hardship to the applicant but the Tribunal does not consider this to be unusual or overly onerous.
36. The Tribunal also notes in relation to financial hardship and the applicant that, should the applicant's Bridging Visa A be cancelled, the applicant may be able to apply for a Bridging Visa 'E' (as an alternative to detention) to remain in Australia for the finalisation of his Partner visa application that is currently before the Department. If granted the applicant may be able to apply for work rights on the grounds of financial hardship.
37. In relation to financial hardship imposed on [Ms A] through the cancellation of the applicant's Bridging visa, the applicant stated that his wife would not be able to afford the rent and pay the bills in her own right. The applicant and [Ms A] said that all cost of living expenses was essentially shared equally between each other, including the rent of their apartment in [location]. The applicant stated that his wife normally worked full-time but was currently working four days a week. The applicant said he had been working in [Industry 1] on various jobs via agencies. Due to coronavirus shutdowns his own employment has reduced significantly in recent weeks. The Tribunal accepts that there will be a degree of increased financial hardship for [Ms A] should the applicant's visa remain cancelled and he depart Australia. The Tribunal does not consider it unreasonable for a couple or an individual to make certain changes to their spending and lifestyle due to circumstances such as those presented in this review. In evidence it was submitted that [Ms A] is not receiving any government financial assistance or support. The Tribunal notes that Australian citizens do retain access to a range of government support when facing genuine financial hardship. The Tribunal accepts there will be a degree of increased financial hardship to [Ms A] should the applicant's visa be cancelled but considers she can mitigate any hardship.
38. [Ms A] stated that if she were to relocate to Fiji, she would find it difficult to gain employment and the levels of pay were much lower than in Australia. The Tribunal notes that there is no requirement for [Ms A] to relocate with the applicant – that is a decision for her and the applicant to make. The Tribunal accepts that gaining employment in a similar office environment may be more difficult and the levels of pay not as attractive as she currently earns in Australia. The Tribunal also notes her statement that she has been building her own career in Australia that may be impeded by moving offshore. The Tribunal accepts the argument that relocation would in all likelihood have some adverse impact upon [Ms A]'s current levels of financial recompense and be disruptive to the career she has been building in Australia should she decide to relocate to Fiji.
39. The applicant stated there would be a strong degree of emotional hardship for himself and the sponsor. Similar testimony was made by [Ms A]. The applicant said he and his sponsor would miss each other. The Tribunal accepts the testimony by both parties that there would be emotional hardship for them both if the applicant was to return to Fiji. The parties however can remain in close contact via modern communication and the sponsor retains the opportunity to travel to Fiji and relocate with the applicant if she sees fit.
40. The applicant and [Ms A] each submitted their desire to have a child would be adversely impacted should the applicant be compelled to return to Fiji. [Ms A] stated they had been attempting to conceive essentially since their marriage. Medical evidence was submitted of a miscarriage by [Ms A] and the Tribunal accepts the evidence of the parties that they have

been trying to commence a family together since 2017. The Tribunal accepts their ability to conceive will be adversely impacted should the applicant be required to depart Australia but notes [Ms A] can either relocate to Fiji or travel to visit the applicant on a temporary basis.

41. The Tribunal has considered any hardship that would be caused to the applicant in relation to his family. The applicant said his mother was a regular visitor to Australia and she stayed with him and [Ms A] for up to six months a year. The applicant stated that his older brother also resided in Australia, living in the central west of NSW at [location]. The Tribunal notes that the applicant will still be able to see his mother in Fiji should he be compelled to depart Australia whilst his brother can visit him in Fiji should he desire. The family can also remain in close communication over the telephone and through other modern tools of communication. The Tribunal considers the hardship caused to the applicant in relation to his family beyond [Ms A] is limited.
42. The Tribunal has considered any hardship that may be caused in relation to the relationship between the applicant's wife [Ms A] and her own family. [Ms A] in her written submission stated that she would be unable to attend her family get together each year if she relocated to Fiji due to financial reasons. She also raised the recent health challenges of her brother who suffered a stroke and her sister who was receiving treatment until recently for breast cancer. [Ms A]'s father is in Victoria whilst her mother resides in [location]. The Tribunal accepts there would be increased hardship to [Ms A] if she was to relocate to Fiji in relation to her own family in Australia. The Tribunal accepts it will be more difficult to remain in physical contact with her own family. The Tribunal however notes that [Ms A] is not compelled to depart Australia with the applicant. She can remain in Australia if she chooses. Furthermore, if she were to depart Australia, she can remain in communication with her own family over the telephone or through various internet channels as regular as she desires. [Ms A] and her family can provide each other with a significant degree of emotional and moral support. They can continue to maintain their family and social links with each other.
43. The Tribunal accepts there is potentially an increased level of hardship [Ms A] will face in relation to her own family should the applicant be compelled to return to Fiji and [Ms A] follows. The Tribunal however considers this is ultimately a decision to be made by [Ms A] and any hardship that may result should she choose to depart Australia can be mitigated.
44. The Tribunal has also considered the specific hardship that may be caused to the applicant given he has an outstanding Partner visa application before the Department should his Bridging Visa A be cancelled. As discussed in relation to financial hardship earlier in this decision record, the Tribunal notes that should the applicant's Bridging Visa 'A' be cancelled, as an alternative to detention the applicant may be able to apply for a Bridging Visa 'E' that may allow him to remain in Australia pending the finalisation of his Partner visa application. The Tribunal also notes that the applicant may otherwise await the outcome of his Partner visa application whilst in immigration detention. The Tribunal considers any hardship caused by the cancellation of his Bridging Visa A to the applicant in relation to his Partner visa application to be limited.
45. The Tribunal has considered all the evidence before it pertaining to the hardship cancellation of the applicant's visa will have upon his own family in Australia and in Fiji. It does not consider it to be a compelling reason not to cancel the applicant's visa in the circumstances of this review. The Tribunal notes that the applicant and his family in Australia can continue to remain in almost constant communication via modern technology if he were to return to Fiji. In relation to his wife [Ms A] however, the Tribunal has some sympathy for his wife who the evidence suggests is strongly committed to the relationship, the commencement of their own family and who has some understandable reluctance to depart Australia, her career and her family for life offshore.

46. The Tribunal accepts on the evidence before it that the applicant would prefer to remain in Australia. The Tribunal however considers the hardship that will be caused to the applicant himself should his visa be cancelled to be limited. The Tribunal considers the hardship that might be caused to his wife to be more onerous. As stated above when considering the degree of hardship that may be caused to the applicant across a range of areas, the Tribunal does however note that should the applicant's Bridging Visa 'A' be cancelled, as an alternative to detention the applicant may be able to apply for a Bridging Visa 'E' that may allow him to remain in Australia pending the finalisation of his Partner visa application by the Department.
47. In relation to the degree of hardship that may be caused, the Tribunal weights this factor slightly against cancelling the visa.

48. *The circumstances in which ground for cancellation arose*

49. The cancellation arose from the charging and conviction of the applicant with multiple criminal offences in the State of New South Wales. The most recent convictions are two counts of enter prescribed premises of any person without lawful excuse; and one count of commit act of indecency with person 16 years or over. The applicant also has incurred previous convictions for one count of common assault (domestic violence); one count of affray; and two counts for assault occasioning actual bodily harm.
50. The Tribunal has given some weight to the applicant for complying with the conditions of his probation and the successful completion of a rehabilitation course that was part of his probation conditions. The Tribunal also notes the applicant has not been involved in any further incidents that have required the involvement of the Police since his convictions in 2019. The Tribunal furthermore gives some weight to the applicant's acceptance of responsibility for his behaviour that led to these convictions. The Tribunal notes that the applicant continues to dispute claimed elements of his behaviour that led to his conviction for the offence of commit act of decency with person 16 years or over. The Tribunal notes the fact that on the evidence he appears to have been cooperative with the Police.
51. The Tribunal gives greater weight however to the fact the applicant has nevertheless been convicted of a number of significant and serious offences, the most recent involving a conviction for an act of indecency and leading to his incarceration for six months. The Tribunal also notes the common assault – domestic violence conviction. The Tribunal considers domestic violence to be a very grave and serious offence. The Tribunal recognises the applicant and his wife [Ms A] – the alleged victim of the domestic violence offence – continue to dispute the circumstances leading to the assault as claimed by the NSW Police and ultimately the NSW Local Court.
52. The applicant explained to the Tribunal in some detail the circumstances surrounding each of his convictions.
53. The Tribunal's greatest concern pertains to his convictions for one count of commit act of indecency with person 16 years or over and the associated two counts of enter prescribed premises of any person without lawful excuse. The Tribunal notes from the decision record that these offences incurred a sentence of twelve months imprisonment with a non-parole period of six months. The applicant commenced his sentence whilst remanded in custody [in] July 2018. It concluded with his formal conviction and release from [Gaol 1 in] January 2019.
54. At the hearing the applicant spoke of the background to his convictions for these offences. He stated he had been on a rugby trip with his club, [Club 1] in the Central West of NSW. The team was staying at [Hotel 1]. The applicant claimed he had become heavily inebriated

whilst drinking with his teammates at the pub and woke the next morning still intoxicated. He claimed in his oral testimony that he got out of bed to have a shower. The accommodation at the hotel however had shared facilities. He claimed he went to another room unaware it was the accommodation of the owners of the establishment. He stated he entered the bathroom – assuming it was a communal bathroom - but was unaware the owner was there. The individual in the shower in the bathroom was a female. He stated that the owner screamed, and he ran out of the room.

55. The applicant stated he was later contacted by the NSW Police about a week later to come in for an interview about the events. The applicant went to the Police voluntarily. He was not charged at this time. The applicant was released without bail but was subsequently arrested about a month later in [location]. The applicant was then taken to [named] Police Station before being brought before the Court. He stated that bail was refused, and he was remanded in custody. The applicant stated he went on to make multiple applications for bail, but all were refused. He stated that his legal representative had unsuccessfully attempted to challenge the Police Facts and have the charges dropped.
56. The applicant claims his decision to plead guilty to the charges was based upon advice from his legal representative at the time. In retrospect he considered it to be a bad decision to make. He stated that he wanted to fight the charges. He disputes the Police Fact Sheets that went before the Court and essentially submits that he intended to commit no harm when entering the hotel owner's accommodation. His argument is that he was inebriated and was simply looking for the shared facilities to take a shower.
57. The argument before the Tribunal is that the applicant's convictions are the result of drunken misbehaviour on a rugby trip with no intent of malice. The Tribunal accepts that trips away by club rugby teams can often involve excessive consumption of alcohol in a spirit of camaraderie, bonhomie, conviviality and collegiality with teammates. These events – particularly in an environment of excessive alcohol consumption - can subsequently lead to various examples of 'skylarking' and behaviour that, whilst tawdry and unbecoming, is essentially innocent in its intent.
58. The Tribunal notes that the applicant has essentially made such an argument in relation to his own behaviour at [Hotel 1]. He has submitted that his own behaviour was the result of intoxication which led to a series of innocent mistakes where, in the search for the shared facilities at the property, he inadvertently entered the accommodation and bathroom of the hotel's owner – whilst she was in the shower.
59. The applicant stated that on the advice of his legal representative he pleaded guilty to the three charges relating to his actions at [Hotel 1] in January 2019 and was immediately released. The applicant and [Ms A] have stated that the applicant pleaded guilty so he could go home to his wife. The applicant has submitted that after being unsuccessful in getting the charges changed then he decided to plead guilty to end the stressful events. He has submitted that he simply wanted to put the troubles behind him and become a good and law-abiding resident of Australia and its community.
60. The Tribunal notes the applicant's arguments as to why he ultimately decided to plead guilty to the charges in relation to the events at [Hotel 1] and his own description and interpretation of events on the morning in question. The Tribunal however has significant concerns as to the applicant's version of the events which he articulated at the hearing as opposed to those that appeared in the NSW Police Fact Sheets which were relied up by the Crown in the convictions. The Tribunal on 13 May 2020 put to the applicant a range of information from the Police Fact Sheets dated 10 April 2018 under s.359A.

61. The Tribunal asked the applicant to comment on respond to information in the Police Fact Sheets. These included that at 8.30am on [a date in] March 2018 the applicant entered the complainant's bedroom whilst she was lying asleep. The complainant heard the floor boards creak; opened her eyes and saw you standing over her fully clothed. The complainant yelled out "Get out of here....get out of here" at which stage the applicant ran out the front door which was open.
62. That at 8.40am on [the same day in] March 2018 the applicant again entered the complainant's private residence. The complainant was in the shower when she turned and saw the applicant naked and with an erection in her bathroom facing her. The Fact Sheet states the applicant then paused before stepping towards the complainant before stepping back from her and running out of the bathroom after she yelled at you to get out.
63. The Fact Sheet states that shortly after, when the complainant was in the garden with her mother, the applicant smiled directly at her, intimidating the complainant who asked him to leave. The Fact Sheets state that the applicant then tried to enter another gated section of the garden where the complainant's mother again directed him to leave.
64. The Tribunal considered this information relevant to its consideration of the discretionary consideration as to the circumstances in which the ground for cancellation arose. The Tribunal explained the consequences of the information being relied upon and invited the applicant to comment on or respond to the information in writing.
65. The applicant responded in writing on 26 May 2020. His response reflected his oral testimony at the Tribunal's hearing. He claimed he was still drunk at the Hotel and woken up when he was sleeping at the property's lounge. He stated he went to his accommodation but someone else was sleeping in his bed. He states he then went looking for an unoccupied bed but was unable to find one. At the end of the hallway he stated he saw a bathroom door and opened it, thinking there might be spare accommodation through the door at the other end of the bathroom. He said he saw a woman sleeping there and thought she might have been one of the girlfriends of the [Club 1] players. He writes that at that same time a teammate yelled out to hurry as their coach was returning to Sydney and the players awoke and headed for the bathrooms. He stated that he then saw that all the bathrooms were occupied, and he remembered there were vacant bathrooms back where he thought there was spare accommodation. He wrote that he thought there would be no one there and he was already naked anyway. He claimed he went to the bathroom and turned the bath water not realising there was already someone there. He claims he didn't know whether it was a woman, or a man and they ran from the bathroom. He stated he then returned to his room and gathered his belongings. The applicant claimed that his fellow players were talking about what had happened and were discussing it on the team's WhatsApp group chat, but he felt he had done nothing wrong. The applicant writes that when in the garden near the carpark that the victim's mother (referred to as the 'grandmother') was mumbling to him and he wasn't sure what she wanted. He writes that she was then yelling at him with a loud voice. The applicant states he departed the property with another player where they were having breakfast and waited there until they were departing to Sydney.
66. The Tribunal notes the applicant's comments and response to the specific information as outlined in the Police Fact Sheets and put to him under s.359A. The Tribunal accepts that the applicant had been heavily drinking but does not accept his claim that his repeated entry to the accommodation of the witness was accidental and unintentional. The Tribunal does not accept that any entry to the witness' bathroom both naked and aroused - whilst she was in the bathroom - is either an accident, a circumstance of chance, a prank, or a grievous misunderstanding on his part. At the very least, it would have been a frightening and confronting experience for the witness who had no idea of knowing whether the intentions of

the applicant were innocent or considerably more sinister and deplorable. It is reasonable to presume that the entry of a naked and aroused stranger into any individual's bathroom would lead them to presume the worst. His subsequent intimidatory behaviour, as outlined in the Police Fact Sheets, where he was smiling at the victim and ignoring instructions to leave the property suggest at the very best a staggering contempt for the victim.

67. The Tribunal has considered the applicant's comments, his oral testimony and s.359A response to the matters raised from the Police Fact Sheet but ultimately prefers the Court's findings from the events of that morning.
68. At the hearing the applicant was forthright in his assertions that his behaviour at [Hotel 1] was not that as was made out by the NSW Police and found by the NSW Local Court. Given this, the applicant had every opportunity to defend himself against the charges in Court. Ultimately, he decided however to instead plead guilty to all three charges – he states so he could go home and put his troubles behind him. The Tribunal accepts the applicant had a desire to reunite with his wife and to extricate himself from [Gaul 1]. The Tribunal has taken into account the applicant's claim that the actions for which he was charged and convicted were essentially unintentional and without malice, and the result of his claimed inebriated state. The applicant was provided with the opportunity to defend himself against the charges in the Local Court but decided not to. It is not the role of the Tribunal for a re-litigation of the applicant's charges from the events at [Hotel 1]. The Tribunal nevertheless is not in the circumstances of this review, and based on the evidence before it, prepared to accept the assertions of the applicant that the events were not as outlined in the Police Fact Sheets.
69. The Tribunal considers the convictions from the events at [Hotel 1] are very serious. The Police Fact Sheets outline a harrowing and indeed terrifying experience for the owner of the property when confronted by the applicant in her own bathroom. The witness naturally had no idea as to the true intentions of the applicant – who was both naked and in a state of arousal - were the result of drunken skylarking, inebriated misunderstanding, or much more sinister and calculated in their intent. It is entirely reasonable for her to fear the latter and to fear the worst. The fact that the applicant unlawfully accessed her accommodation twice only exacerbates such a fear.
70. The Tribunal discussed with the applicant his conviction in 2018 for Common Assault (Domestic Violence). The applicant and his wife [Ms A] both continue to dispute the NSW Police version of the events that was relied upon by the Local Court in its conviction.
71. The applicant and [Ms A] in oral evidence each put forward an alternate outline of events as that relied upon by the Court. The Tribunal notes their written statements on the matter which reflect their oral testimony. The applicant and [Ms A] each denied an assault at their home ever took place and the Police statements were not accurate. The Tribunal notes the evidence presented of a letter from [Ms A] to the NSW Police Local Area Commander asking for the charges to be withdrawn, stating the assault never took place and apologising for wasting Police time. Both parties discussed the extent they went to in unsuccessfully attempting to have the charges dropped. The applicant stated that [Ms A] had contacted the Police the night in question to scare him which led to the visit to their home by the Police. [Ms A] agreed she had contacted the Police, stating she was concerned the applicant was about to go out looking for the individuals they had been in dispute with earlier in the evening at [Hotel 2] which led to their removal from the premises. [Ms A]'s correspondence to the NSW Police LAC blames herself for contacting the Police and states on the evening she was 'drunk, emotional and stressed' about her and the applicant's wedding plans.
72. The Tribunal notes the firm testimony of [Ms A] concerning the charges and takes her claims into account. It gives her claims some weight. [Ms A] stated that the applicant did not obtain legal representation until sentencing as they never thought the matter would lead to formal

charges and convictions. The Tribunal notes the parties consistently denied the charges and the applicant pleaded not guilty in Court. The Tribunal asked [Ms A] about her written statement that was provided to the Tribunal. In the statement she wrote that the applicant said to the Police officers that came to their residence after her telephone call that he hit her. She explained the statement by stating the applicant's English is not very good and sometimes he answers 'yes' when not actually knowing the response to a question. The Tribunal takes into account the applicant and [Ms A] testimony but nevertheless notes that the applicant was ultimately convicted of what is a serious offence that involves the committing of an act of violence. Domestic violence remains a significant problem in Australian society and the Court ultimately, on the evidence before it, convicted the applicant. The Tribunal does not serve as a venue for the applicant to re-litigate these charges. The Tribunal, whilst recognising the evidence and testimony of the applicant and [Ms A], consider the conviction to be serious and of concern.

73. The Tribunal also discussed with the applicant and [Ms A] the background of the applicant's convictions in 2017 for affray and assault occasioning actual bodily harm. The applicant stated he had been at [Ms A's] cousin's [birthday] at [venue]. [Ms A] had departed home whilst he remained drinking where there was an open bar tab. Subsequently he met a group of individuals and gone to the McDonalds restaurant in nearby [location] where a fight developed with a group of other individuals. The applicant stated the Police came and he tried to run away but instead fell, broke his ankle and was hospitalised. He was subsequently charged at the Police Station after discharge. The applicant stated there was no Police interview. The applicant stated he pleaded not guilty to the charges but was instead convicted. The applicant stated he had successfully completed his community service order.
74. The Tribunal notes that the convictions from 2017 again include the committing of physical violence. Whilst the Tribunal makes no comment on the circumstances surrounding the incident, the Tribunal notes that the events that led to these convictions occurred less than a year after the applicant arrived in Australia and whilst he was still on a Visitor's visa. The Tribunal considers there is a reasonable community expectation that visitors to Australia in the community will diligently obey the laws of the State and Commonwealth.
75. The Tribunal does note that all three separate events across three years that led to the applicant's convictions occurred in an environment where there was an excessive use by the applicant of alcohol. The applicant and [Ms A] have both conceded that the applicant had an issue with his consumption of alcohol. The applicant has submitted that he is not at risk of reoffending as he has completed a rehabilitation programme to address his alcohol consumption that he asserts was a major factor that led to the actions which precipitated his convictions. The applicant and [Ms A] both have submitted that the applicant has not consumed alcohol since he was gaoled [in] July 2018.
76. The Tribunal does not doubt that excessive alcohol consumption played a role in the applicant's actions that led to his convictions. The Tribunal recognises the efforts he has subsequently made to stop drinking and improve himself. Nevertheless, the Tribunal notes that the applicant was an adult when he committed each of these criminal acts. It is entirely reasonable to expect the taking of such level of responsibility by the applicant. He was 28 years of age when he incurred his initial convictions for assault occasioning actual bodily harm and affray. This is not a teenager but a mature, university-educated individual that was initially visiting Australia and has then been residing in Australia whilst seeking permanent residency. The Tribunal considers it is reasonable to expect better behaviour from an individual in the applicant's circumstances. The Tribunal noted at the hearing the applicant's submissions that moving to Australia caused him a degree of culture shock and he was living his life as in Fiji rather than Australia. The Tribunal does not consider this an acceptable

excuse for the behaviour that led to his convictions. The applicant agreed that his convictions related to behaviour that would not be acceptable in Fiji.

77. The Tribunal recognises the applicant's remorse for his actions. He has stated there will be no repeat behaviour. The Tribunal notes that there is no evidence before it of any further behaviour now for almost two years. The Tribunal recognises that the applicant appears to have accepted he had an issue with alcohol and has taken some steps to rectify this. The Tribunal takes into account the applicant's (and [Ms A]'s) strong disagreement with the claimed facts surrounding some of his more serious convictions but again notes it is not its role for these criminal matters to be re-litigated.
78. The Tribunal however notes that the applicant has been convicted of criminal charges that were serious enough for him to be incarcerated for six months. In less than a two-year period, commencing within a year of his arrival in Australia, the applicant was convicted of charges involving physical assault, domestic violence, entering a premise unlawfully twice and committing an act of indecency. The Tribunal considers this suggests a propensity by the applicant for unlawful behaviour and a blatant disregard for the laws of the State of New South Wales and indeed the community he wishes to be part of on a permanent basis.
79. The applicant has explained to the Tribunal the background to the convictions and his recollection of events. Having taken all the evidence into account the Tribunal weighs the circumstances in which the ground for the cancellation arose strongly in favour of cancelling the visa.

80. *Past and present behaviour of the visa holder towards the Department*

81. The Tribunal has considered the past and present behaviour of the applicant towards the Department. The decision record the applicant provided indicates the applicant responded to the NOICC and has actively engaged in the cancellation consideration process. On the evidence before it the Tribunal weighs this factor slightly against cancelling the visa.

82. *Whether there would be consequential cancellations under s.140*

83. The applicant confirmed at the hearing there are no dependent visa holders as part of his visa. The Tribunal therefore finds that there will be no consequential cancellations under s. 140 if the visa is cancelled. The Tribunal weighs this factor neither in favour nor against cancelling the applicant's visa.

84. *Mandatory legal consequences of a decision to cancel the visa*

85. The Tribunal notes that the applicant will become an unlawful non-citizen if his visa is cancelled and may be liable for detention under s189 and removal under s198 of the Migration Act if he does not voluntarily depart Australia. The Tribunal has considered that indefinite detention is a possibility if his visa was to be cancelled. The applicant will also be subject to an s48 bar which will limit his options in applying for further visas in Australia. Depending on the visa applied, the Tribunal notes that the applicant will be subject to Public Interest Criterion 4013 as a result of the cancellation and may not be granted a temporary visa for three years from this date except in certain circumstances. The Tribunal notes that the applicant currently has an application for a Partner visa currently before the Department. Should the applicant's Bridging Visa 'A' be cancelled, the applicant may be able to apply for a Bridging Visa 'E' that may allow the applicant to remain in Australia until his Partner application is considered by the Department. The legal consequences of the cancellation specific to the applicant is that he is likely to be removed to Immigration Detention upon cancellation unless granted another visa - the Bridging Visa 'E' - that allows him to stay for or

pending the resolution of his Partner application before the Department. On the evidence before it, the Tribunal weighs this factor neither in favour nor against cancelling the visa

86. *International obligations – non-refoulment*

87. The Tribunal is not aware of any international obligations which would be breached as a result of the cancellation. None has been claimed.
88. The Tribunal weighs this factor neither in favour nor against cancelling the visa.

89. *The best interests of any children under the age of 18 in Australia who would be affected by the cancellation.*

90. The evidence indicates that the applicant has a child in Fiji that resides with the parents of his former partner. His wife [Ms A] and he do not currently have children.
91. Given these facts, the cancellation of the applicant's visa will not result in either a separation of the family unit or the separation of the children from either parent given the family unit has already been separated. The Tribunal weighs this factor neither in favour nor against cancelling the visa.

92. *Any other relevant matters*

93. None.

94. *Conclusion*

95. The Tribunal has weighed the considerations. In this case, the Tribunal has considered the seriousness of the applicant's convictions, his contesting of the Police version of some of these events as well as his statements of regret and remorse for his behaviour. The Tribunal has taken into account his preparedness to give up alcohol, which he and his wife submit has been a common thread in his anti-social behaviour. The Tribunal has had regard to his claims as to the hardship he and his wife will face should his visa be cancelled.
96. However, the Tribunal considered these factors were outweighed by the other considerations. The Tribunal notes that the Commonwealth Government has a low tolerance for criminal behaviour by non – citizens who are in the Australian community on a temporary basis and do not hold a substantive visa. The Tribunal considers the events that occurred at [Hotel 1] which led to his conviction for commit an act of indecency to be of grave concern. The fear and terror his behaviour at the property would have caused his female victim is, in the Tribunal's opinion, considerable and cannot be justified as either an innocent mistake or the result of gross inebriation. The applicant's incarceration for six months for this conviction indicates the seriousness of the offence. Similarly, the Tribunal, whilst recognising the contesting claims of the applicant and [Ms A] on what occurred on the evening of the domestic violence conviction, also takes a particularly dim view of domestic violence which remains a cancer in Australian society. The Tribunal furthermore notes the convictions the applicant incurred just months earlier for assault causing actual bodily harm. The recidivism of the applicant despite being in Australia as a guest, initially as the holder of a Visitor visa and then a Bridging visa, suggests a disregard for the laws of the Commonwealth. The Tribunal appreciates the blame he and his wife squarely place on his relationship with alcohol and accepts he has tried to now move on from his problems in this area. The Tribunal does not however consider that that mitigates him of the responsibility for the anti-social, intimidatory and violent behaviour that has led to him facing five charges on three separate occasions in a period of less than two years and led to his incarceration for six months.

97. The Tribunal does take into account the hardship that will be caused to the applicant and his wife in cancelling his visa. The Tribunal has sympathy for [Ms A]. She has had to bear a considerable amount of the cost of the applicant's behaviour. She is clearly very committed to the relationship and has done much to support the applicant. She has a strong desire to commence a family and cancellation of the applicant's visa can potentially make achieving this goal more difficult. The Tribunal understands her reticence in relocating to Fiji given both her family and her career. The Tribunal accepts that both the applicant and [Ms A] will face hardship in the cancellation of the applicant's visa. This hardship however is outweighed, in the Tribunal's opinion, by the gravity and seriousness of the applicant's criminal convictions.
98. The Tribunal considers that the nature of the convictions and the circumstances of the events that led to the convictions are such that the Tribunal considers the visa should be cancelled. The Tribunal has carefully considered the applicant's evidence and his explanations and submissions both independently and cumulatively.
99. Considering the circumstances as a whole, the Tribunal concludes that the visa should be cancelled

DECISION

100. The Tribunal affirms the decision to cancel the applicant's Subclass 010 (Bridging A) visa.

Justin Owen
Senior Member